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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-938

COX BROADCASTING CORPORATION AND
THOMAS WASSELL,
Appellants,

v.

MARTIN COHN,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF GEORGIA

REPLY BRIEF FOR THE APPELLEES

INTRODUCTION

This brief is submitted in response to the reply brief of appellants. Appellee has made every effort to avoid repetition of the same arguments made in its original brief but feels that

a further explanation of its position is necessary, especially in light of appellants' assertion that two recent decisions of this Court may have altered the legal and constitutional posture of this case.[1] Insofar as appellants have reargued their position as to the jurisdictional issues in this case, appellee sees nothing new that had not already been stated. Appellee, therefore, is content with its original brief thereon, but would add, as a point of emphasis, that this Court's decision in accepting jurisdiction in *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971) seemed to rely on the fact that there was no indication that a temporary injunction rested on a disputed question of fact "that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." Decidedly, there is a great deal more to be decided upon the trial of this case than "a formality." For the same reasons, appellee believes this Court's acceptance of jurisdiction in *Tornillo*, supra, is similarly distinguishable.

I.

PRELIMINARY REBUTTAL

A.

APPELLANTS ARGUE THAT THE FIRST AMENDMENT PROHIBITS THE STATES FROM LEGISLATIVELY OR JUDICIALLY PROTECTING THE ANONYMITY OF PRIVATE CITIZENS FROM PUBLICATION IN THE PRESS.

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[1] *Gertz v. Welch*, ____ U. S. ____, 41 L.Ed.2d 789, 94 S.Ct. (1974); *Miami Herald Pub. Co. v. Tornillo*, ____ U. S. ____, 41 L.Ed.2d 730, 94 S.Ct. ____ (1974).

The thrust of appellants' argument seems to be that the States, through either the judicial or legislative branches of government, are constitutionally powerless to provide for the privacy of its citizens by determining that certain classes of its citizens or certain subject matter is not a matter of public interest and therefore constitutionally unprotected. Concomitant with this assertion is an elaborate exposition why the specific identity of a rape victim is a matter of public interest and therefore constitutionally protected. But if the States are powerless to declare that certain facts are not newsworthy or matters of public concern, why would it be necessary to even argue the newsworthiness of the identity of a rape victim? To ask the question is to suggest the answer, i.e., the constitutional protections for free speech and press have been limited to newsworthy persons and events. "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2nd Cir. 1940); cert. den., 311 U. S. 711 (1940); *Time, Inc. v. Hill,* 385 U. S. 374, 383 (Fn. 7). This Court noted in *Time, Inc. v. Hill,* supra, that there was no question there presented whether truthful publications of such matter (i.e., intimate revelations) could be constitutionally proscribed.

It seems clear, thusly, that the precise issue raised in this case was absent in the *Hill* case, but it also seems equally apparent that a threshold decision must be made as to State power, judicial or legislative, to declare, in well-defined and narrow limits, that certain facts are not newsworthy. Recognition that this power does exist may be found in appellants' brief where they state that "appellee must demonstrate that the evils to the order and morality of our

society are so grave and imperative and that the facts published, though truthful, are of no conceivable value to any segment of the public as a 'step to truth' as to amount to a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest."[2] While overstating the case somewhat, even that excerpt presupposes a limited power of the State to make a judgment that certain facts, though truthful, may not be published. Precisely this has been done here. Initially, the General Assembly of Georgia legislatively prohibited the publication of the name or identity of the victim or a rape or attempted rape. Secondly, the Supreme Court of Georgia made an independent judicial analysis, quite similar to that of the Wisconsin Supreme Court in *State v. Evjue*, 253 Wis. 146 (1948), and concluded as a matter of law that the identification by name of the victim of rape was not a matter of public interest that warranted constitutional protection. A fortiori, the statute was upheld.

B.

APPELLANTS ASSERT THAT THE NAME OF THE VICTIM OF A RAPE IS A MATTER OF PUBLIC INTEREST.

Appellants' assertion that appellee has overlooked their reasoning and authority in arguing that the publication at

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[2] Appellants' Reply Brief, p. 28, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

A further exposition of this argument may be found at a later point in this brief.

issue is a matter of public interest entitled to constitutional protection is untrue.[3] Appellee has carefully evaluated appellants' reasoning and finds it without merit and lacking in common sense. All of the positive attributes appellants assert that arise from publication either are matters that could be the subject of robust debate and commentary without the use of the name at all or are outside the realm of legitimate public discussion. In summary, appellants' assertions and the rebuttal thereto are as follows:

1. Disclosures of the name of the victim could assist in securing eyewitnesses for or against the accused.

Aside from the obviously contingent and remote nature of this reasoning, it presumes that the press is an arm of the prosecution or defense. If there were a need for witnesses the solution would lend itself to the parties and their attorneys or the agency responsible for investigation. Furthermore, there are numerous ways of identifying the facts of a crime without the use of the specific name. Besides, the need for witnesses was gone at the time of the instant publication as the cases were disposed of save one, and that was ready for trial.

2. Identification of the victim might aid a possible witness to recall information about the victim's associations, habits, reputation, matters of provocation and enticement.

Primarily, this too addresses itself to the parties and their attorneys, but even more importantly, such

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[3] Reply Brief of Appellants, pp. 29-30.

information consists of the scandalous material heretofore used to blacken the reputations of rape victims that is inadmissible in the courts of Georgia now and may well be declared inadmissible in other States before long.[4] Again, this rationale is remote and contingent and does not do credit for the proponents of such publicity.

3. The people need to be informed of the victim's character, social, economic and educational background.

All the foregoing may be disclosed without publishing the identity of the victim.

II.

THE STATES MAY CONSTITUTIONALLY PROTECT THE PRIVACY OF ITS CITIZENS WHEN THE FACTS SOUGHT TO BE PROTECTED ARE OF LIMITED OR NO PUBLIC INTEREST.

The State of Georgia has sought to protect the right of privacy of a class of its citizens against what it deems to be unreasonable publicity for rational reasons related to social order and justice. As already pointed out in appellee's original brief, rape is a seriously under-reported crime. It is also a unique offense, the consequences of which can only imperfectly be appreciated by men. Appellants have said that

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[4] California has enacted a new rape law banning virtually all disclosures of a rape victim's prior sex life in court. Purportedly this has already induced more women to report rapes. *Atlanta Constitution,* Oct. 28, 1974.

since the victim died at the time of the crime the policy of Ga. Code Ann. §26-9901 to encourage victims to report and prosecute crimes is "specious at best."[5] Whatever speciousness there might be is attributable to appellants' lack of recognition that encouragement to prosecute or the reverse involves the family of the victim, and the record shows how the prosecution was impaired by appellants' violation of the law.[6] Thus the underlying purpose of the statute as interpreted by the Supreme Court of Georgia is amply borne out.

It has therefore been demonstrated that from a factual standpoint and a logical, commonsense approach, the publication of the identity of the victim of a rape is of little or no value. As noted by this Court in *Time, Inc. v. Hill,* supra, in general, truthful reports of recent crimes and the names of suspects or offenders will be deemed protected by the First Amendment. But in construing that decision, the Supreme Court of California, in *Briscoe v. Reader's Digest Assoc.*, 93 Cal. Rptr. 866, 483 P. 7d 34 (1971) concluded that the First Amendment did not give the media the unmitigated right to publish the identity of suspected offenders or victims. In some jurisdictions, for example, the legislature has decided that the rehabilitative goals of the juvenile law are so important as to override the right of the press to identify juvenile defendants. In many other States the right of the press to report juvenile proceedings are limited. *In Re Gault,* 387 U. S. 1 (1967); *Briscoe v. Reader's Digest Association,* supra. Similarly, some states have prohibited the

[5] Appellants' Reply Brief, p. 38.

[6] See affidavits of John H. Nuckolls, Appendix at pp. 11-15, 30-32.

naming of rape victims in news reports. *Fla. Stat.* §794.03, F.S.A.; Ga. Code Ann. §26-9901; S. C. Code Ann. §16-81; Wis. Stats. Ann. §942.02. In both areas a contingent and remote case may be made for the newsworthiness of publishing specific identities, but compared with the social advantages of privacy, constitutional arguments nearly evaporate.[7]

III.

THE STATE OF GEORGIA HAS PROTECTED THE CONSTITUTIONAL RIGHTS OF A CLASS OF ITS CITIZENS THROUGH LEGISLATIVE AND JUDICIAL DECISION.

Instead of viewing this case as an abridgment of the First Amendment, one may equally view the statute and decision of the Georgia Supreme Court as in furtherance of the Bill of Rights. This Court, in *Griswold v. Connecticut,* 381 U. S. 479 (1965), albeit speaking of governmental intrusions into privacy, enunciated the proposition that the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. *Griswold v. Connecticut,* at 484. Various guarantees create zones of

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[7] For other examples of factual reports of current events not absolutely privileged, see: *Commonwealth v. Wiseman,* 356 Mass. 251 (film showing conditions in mental hospitals, including naked inmates, forced feedings, masturbation, sadism, with individuals identifiable); *Barber v. Time, Inc.,* 348 Mo. 1199 (1942) [name and picture of a woman with humiliating disease]; *York v. Story,* 9th Cir. (1963), 324 F.2d 450, cert. den. 376 U. S. 939 [indecent photos of plaintiff in poses induced by police officer].

privacy such as the right of association contained in the penumbra of the First Amendment; the Third Amendment's strictures regarding quartering of troops; the Fourth Amendment's prohibition against unreasonable searches and seizures; the Fifth Amendment's self-incrimination clause; and the provisions of the Ninth Amendment. What are we to say, then, when the State actively seeks to protect a class of its citizens, for rational reasons, directly related to social order and justice, and preserve a right implicitly thought to have constitutional dimensions. Is not this Court compelled to recognize that if the State has done so, it must perforce balance the interests that compete? Appellee submits that appellants have totally ignored the rational and constitutional justification for privacy in this case by a rote repetition of precedents reflected through a one-way looking glass.

IV.

GA. CODE ANN. §26-9901 DOES NOT UNCONSTITUTIONALLY ABRIDGE THE FREEDOM OF THE PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

In their reply brief Appellants argue at length that Ga. Code Ann. §26-9901 must fall because of certain decisions of this Court and for overbreadth. Appellee feels it essential to review those decisions of major importance to emphasize their distinguishing characteristics from this case. At the outset, appellants ignore the interpretation given this statute by the Supreme Court of Georgia[8] in which it was held that the

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[8] Appendix to Jurisdictional Statement, A-26.

statute did not create a civil cause of action with consequent negligence per se. All the statute did was to say that the name or identity of a rape victim was not a matter of public concern and hence newsworthy. Damages will ensue only after a trial in which the plaintiff must prove that the public disclosure actually invaded his "zone of privacy" and also to prove that Appellants invaded this privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive.

In point of fact, the statute aids in avoiding the vice printed out in *Time v. Hill*, supra, where this Court deprecated the danger ensuing from an elusive negligence standard when the contents of the speech might afford no warning of prospectivy harm. In *Time v. Hill*, supra, of course, this Court was dealing with the press' knowledge of the falsity of a publication and the danger of liability for innocent or mere negligent misstatements. Here, a privacy case, such an issue does not exist. Further, the statute gave prospective notice in the clearest terms that publication was unauthorized, avoiding the pitfall involved in *Time v. Hill*.[9] Of the greatest importance is the fact that this Court made a judicial finding that the opening of a new play was a matter of public interest within the scope of protection afforded by constitutional guarantees of speech and press (Id. at p. 387). Consequently, this Court must make a similar initial decision in deciding the issue in this case.

The distinction between this case and *Gertz v. Welch, Inc.*, ____ U. S. ____, 41 L.Ed.2d 789, 94 S.Ct. ____ (1974)

[9] It should be noted that appellants had an internal policy against making the disclosure that forms the basis of this case. Appendix, p. 18.

is of the utmost importance. In capsulated form, this Court held that the First Amendment protection afforded the news media against suits by public persons is not to be extended to defamation suits by private individuals even though the defamatory statement concerns an issue of public or general interest. Secondly, as long as they do not impose liability without fault, the States may define for themselves appropriate standards of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual. Thirdly, defamation plaintiffs unable to prove actual malice or reckless disregard for the truth are restricted to compensatory damages.

As to point one of *Gertz*, this case presents a situation in which a private person is suing the news media for making not a defamatory statement but a true statement regarding a matter *not* of public or general interest. As to the second point, here, liability has not been imposed without fault and the State has defined appropriate standards of proving or defining liability. The third point cannot have relevance to a privacy case as a reckless disregard for the truth could hardly be in issue, when by definition the publication, though unwarranted, is true. Appellants' analysis in their reply brief[10] is hardly persuasive. Their assumption that truthful speech is entitled to greater constitutional protection than defamatory or false speech does not necessarily follow when the true speech has serious negative social repercussions affecting a large class of persons while a defamatory statement, as in *Gertz*, affects but one man. The lack of opportunity for rebuttal in privacy cases is a compelling

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[10] At p. 21, Footnote 44.

argument in favor of meaningful civil sanctions as no other redress, such as an apology or retraction, is possible. Further, contrary to appellants' assertion, there was ample warning that the statement would offend the "privacy" of private individuals. Why else the internal policy of appellants referred to above and what of the State statute, knowledge of the existence of which appellants have never denied? Finally, the factors that exist in favor of protecting the victims of rapes and their families from identification simply do not exist for the families of perpetrators. Significantly, appellants have evinced no awareness of the uniqueness in our culture[11] of the horror and shame arising from rape and lack any sensitivity therefor.

Appellants' analysis of *Miami Herald Publishing Co. v. Tornillo*, ____ U. S. ____, 94 S.Ct. 283 (1974) is also faulty. The statute in question there was a positive command requiring a newspaper to give space and incur an obligation of funds requiring, in effect, submission to a governmental dictation of what was to be printed. It also concerned a matter clearly of public interest, i.e., in the political context. That is a far cry from the issues in this case, but even as tortured as the construction of *Tornillo* by appellants is, they concede that the editor's determination as to the public interest may be reviewable for abuse of his constitutional discretion.[12] It is precisely that abuse that forms the basis of this case.

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[11] And many other cultures. Cf. the appalling situation in Bangladesh where married women raped by invading soldiers were spurned as outcasts by their husbands. "The Rapes of Bangladesh," *The New York Times Magazine*, p. 10, July 23, 1972.

[12] Reply Brief of Appellants, p. 4.

CONCLUSION

In *New York Times Co. v. U. S.*, 403 U. S. 713 (1971) Justice Douglas, in his concurring opinion, stated that "the dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be." At p. 723. "... Open debate and discussion of public issues are vital to our national health. On *public questions* there should be uninhibited, robust, and wide-open debate." *New York Times v. Sullivan*, 376 U. S. 254. A recurring theme is governmental suppression of information relating to possible or actual governmental misconduct, *Near v. Minnesota*, 283 U. S. 697 (1931), with the concomitant use of the injunction. *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971). Here, there is no question of injunctive power and the suppression, if the use of that term is apt, is not an attempt by government to protect itself or the "powers-that-be' from embarrassment, official or otherwise. No far reaching issue of censorship is involved nor is robust debate on public issues prevented. Nothing in the legislation or the decision of the Supreme Court of Georgia assailed by appellants limits one whit their ability to report in minute detail the facts and circumstances of the crime. The only thing the press may not do is link the facts of the case with the specific identity of the victim of a rape, not only for her protection but that of

society, which until now has treated such unfortunates with ostracism causing measureless tragedy. This case is stark proof that reliance on voluntary restraint and good taste by the press cannot be expected. To compare the weighty issues presented in *New York Times Co. v. U. S.*, supra, or *Garrison v. Louisiana*, 379 U. S. 64 (1964) to this case is to be blind to the true stature of the issues involved here. A reflexive, absolute view of the First Amendment has not been adopted to date by a majority of this Court. To do so now, either by holding the statute unconstitutional or by limiting recovery to actual damages, will totally destroy any right of privacy from the Press that private persons may now have in this Nation. As the Court aptly noted in *Miami Herald Publishing Company v. Tornillo*, supra, there has been a revolution in the communications media which raises serious questions of diversity of information and opinion in light of local monopoly.[13] The press is, in some cases, arguably as powerful as government. In this case the cast of characters consists not so much as the State v. press, but a sole individual, the bereaved father of a raped daughter, against an enormously powerful and wealthy business conglomerate who tore the veil of privacy from him without the slightest justification. To cast Appellants in the role of champions of a free press and victims of censorship or oppression is mockery.

STEPHEN A. LAND
225 First National Bank Building
Decatur, Georgia 30030

Attorney for Appellee.

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[13] B. Bagdikian, *The Information Machines, 127 (1971).*